Supreme Court, U.S.
FILED
NOV 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-677

IN THE

Supreme Court of the United States

October Term, 1988

DELBERT BOYLE,
PERSONAL REPRESENTATIVE OF THE
HEIRS AND ESTATE OF
DAVID A. BOYLE, DECEASED,

Petitioner,

v.

UNITED TECHNOLOGIES CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

LEWIS T. BOOKER
LONNIE D. NUNLEY, III
Hunton & Williams
707 East Main Street
P. O. Box 1535
Richmond, Virginia 23212
(804) 788-8200

Counsel for United Technologies Corporation

November 21, 1988

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Respondent United Technologies Corporation (UTC)* respectfully requests that this Court deny the petition for writ of certiorari seeking review of the August 3, 1988, opinion of the United States Court of Appeals for the Fourth Circuit in this case upon remand. Three reasons compel denial.

First, certain questions presented for review raise matters which should have been raised, if further review or clarification was needed, by petition for rehearing to

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* The listing of related corporations required by Rule 28.1 of this Court which accompanied the Brief for United Technologies Corporation filed on May 21, 1987, is still accurate.

this Court following this Court's June 27, 1988, opinion. It is far too late now to seek a rehearing in the guise of a petition for writ of certiorari.

Second, certain other questions presented raise issues for the first time, issues not pertinent to this appeal but instead issues which should have been raised, if at all, in the original petition to this Court. Finally, to the extent that the petition asserts error as to the ruling of the Court of Appeals for the Fourth Circuit made after remand, the decision of the Court of Appeals was plainly correct and should not be disturbed.

I.

STATEMENT OF THE CASE

Petitioner seeks a writ of certiorari to the Court of Appeals for the Fourth Circuit to review that court's August 3, 1988, decision of this case upon remand. Petitioner also asserts at page 1 of the petition that he seeks review of the May 27, 1986, decision of the Court of Appeals, the decision upon which this Court has already heard argument twice. The petition cannot properly be for a writ to review the opinion of the Fourth Circuit in *Boyle v. United Technologies Corporation*, 792 F.2d 413 (1986), the original opinion in this case, even though the statement of the case set out by petitioner purports to be primarily addressed to perceived errors in that opinion.

Upon remand the issue this Court put to the Fourth Circuit was precise:

> . . . . Although it seems to us doubtful that the Court of Appeals was conducting the factual evaluation that petitioner suggests, we cannot be certain from this language, and so we remand for clarification of this point. If the

> Court of Appeals was saying that no reasonable jury could find, under the principles it had announced and on the basis of the evidence presented, that the Government contractor defense was inapplicable, its judgment shall stand, since petitioner did not seek from us, nor did we grant, review of the sufficiency-of-the-evidence determination. If the Court of Appeals was not saying that, it should now undertake the proper sufficiency inquiry.

___ U.S. ___ , 108 S. Ct. 2510, 2519 (1988).

The Court of Appeals forthrightly answered the question put to it in its unpublished opinion of August 3, 1988, reprinted at pages A49-51 of the petition, at page 51:

> As the Supreme Court suggested, the language in question was intended to express our holding that no reasonable jury could have found for the plaintiff on the facts presented. It is clear in this case that the military contractor defense was established as a matter of law.

In light of that clarification, the Court of Appeals, following this Court's mandate, directed that judgment be entered for UTC. That clearly ended the matter. Nevertheless, without waiving its position that the only issue before the Court on this petition is whether the Fourth Circuit properly responded to the inquiry of this Court, UTC does address specific factual contentions made in the petition.

A. *The Defective Flight Control System.* Petitioner again contends that the evidence at the trial established that there were defects in the design of the automatic flight control system (AFCS) and that it did not conform to the Navy specifications. The problem with raising that issue now is that the trial court did not submit any

alleged defects in the flight control system to the jury. Petitioner took no exception to the trial court's refusal to charge the jury on defects in the flight control system. Before charging the jury, Judge Richard L. Williams of the United States District Court for the Eastern District of Virginia told counsel (J.A. 442, 443):**

> Now, on the manfacture, other than the design, on the design characteristics of it, I am letting that go [to the jury] on the location of the collective stick and the handle for the emergency exit.
>
> The other thing I am really letting go to the jury is the re-manufacture of the servo and not the original manufacture. . . .

The trial court charged the jury (J.A. 458-459):

> In this case the plaintiff claims the defendant was negligent in its design of the copilot's egress system and/or the re-working of the Moog valve of the AFCS servo and that one or both of these negligent acts was the proximate cause of the death of David Boyle.

Petitioner now seeks indirectly to raise the decision of the trial court not to give an instruction on a defect in the design of the AFCS as a justification for granting a writ of certiorari. Petitioner never raised that issue in the Court of Appeals, the original petition for writ of certiorari or in either the first or second round of briefs to this Court.

B. *The Defective Escape System.* Petitioner assumes in the petition as a conclusion what was instead a disputed issue of fact at the trial. Petitioner states unequivocally that the copilot's escape system was de-

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** J.A. refers to the joint appendix prepared by the parties for the prior argument of this case in this Court.

fective and that UTC failed to point that defect out to the Navy. The evidence showed exactly to the contrary. UTC designed the escape hatch to be jettisonable outward. Petitioner's expert contended that it should have been jettisonable inward. The Navy itself had specified that the escape hatch be jettisonable, not only for the helicopter involved in this accident but for all Navy helicopters (DX 11; J.A. 492). That has universally been interpreted in the design of military helicopters as a requirement that the hatch fall outward.

Even more pertinent to this case, the evidence established without contradiction that there was no defect at all in the emergency escape hatch system which could possibly have caused or contributed to Lieutenant Boyle's death. Captain Burt Tussing, the pilot of the helicopter, was sitting directly opposite Lieutenant Boyle. When the helicopter entered the water Captain Tussing pushed his escape hatch out against the water, even though the helicopter was rolling in the water, and his hatch was almost entirely submerged. He pulled the escape hatch knob, the hatch fell out, and he escaped the helicopter safely (J.A. 122-23). On the other hand, Lieutenant Boyle did not attempt to use his escape hatch. The escape hatch knob included a light shear wire designed to demonstrate whether the hatch had been opened. After the accident an examination showed that the shear wire had not been disturbed, demonstrating that Lieutenant Boyle had made no attempt to use his escape hatch (Stipulation of Facts, page 2).

II.

REASONS FOR DENYING THE WRIT

A.

The Petition Raises Issues Previously Decided By This Court

The petition presents ten questions for review. Six of them, Questions 1, 3, 5, 6, 7 and 8, relate either to issues this Court decided in its June 27, 1988, opinion or issues as to which Petitioner raised no controversy before this Court at the time of the first appeal.

Question 1 contends that there is confusion in the circuits as to the proper factual tests of the government contractor defense. However this Court was very explicit in its opinion in setting out the three factual tests:

> . . . . Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of equipment that were known to the supplier but not to the United States.

____ U.S. ____ ; 108 S. Ct. 2510, 2518 (1988).

No common law appellate court sets out in a vacuum what explicit facts warrant recovery under a legal theory, whether contract, tort or otherwise. An appellate court states general principles; it then becomes the responsibility of the individual court or jury in a specific case to apply the facts found in a particular case to the principles announced. The suggestion that this Court's formulation of the elements of the government contractor defense has left confusion in the circuits is nonsense.

Only one Court of Appeals has had occasion to apply that aspect of this Court's opinion which relates to the government contractor defense since it was announced. In *McGonigal v. Gearhart Industries*, 851 F.2d 774 (5th Cir. 1988), that court correctly found, consistent with this Court's decision, that the defense related to design defects, not manufacturing defects. Any confusion in the circuits which may have been perceived to exist prior to this Court's decision has been resolved by that decision.

Questions 3 and 5 raise identical contentions. Petitioner argues that the Fourth Circuit had no right to ignore conflicts in the evidence or to depart from an accepted and usual course of judicial proceedings by setting aside a jury verdict. Baldly stated, petitioner argues that no trial court after verdict, and no appellate court upon review, can ever set aside a verdict without violating the Seventh Amendment to the United States Constitution. This Court has rejected that contention time and again; in *Neely v. Eby Construction Company*, 386 U.S. 317 (1967) this Court said, at page 322:

> . . . . As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n.o.v.* than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment *n.o.v.* [citation omitted].

Accord, *United States v. Geneves*, 405 U.S. 93, 106 (1972).

Question 6 contends that this Court should grant a writ to establish where the burden of proof lies in a government contractor defense case, a complete non-issue. That has never been an issue in this case. The trial court

charged the jury that the burden of proof on the government contractor defense lay with the party asserting it:

> In addition, the plaintiff cannot recover under either a theory of negligence or breach of implied warranty based upon a design defect if defendant, U.T.C., proves by a preponderance of the evidence these three things. One, that the United States Navy established or approved the specification for the co-pilot egress system; two, that the helicopter conformed to the specification; and three, that the United States Navy knew as much or more than the defendant about the helicopter's hazards and therefore defendant did not need to warn the government of the dangers involved in the use of the equipment. (J.A. 461).

UTC took no exception to this allocation of the burden of proof in the trial court and assigned no error to the allocation of the burden of proof either in the Court of Appeals or in this Court. To suggest that a petition should be granted to determine where the burden of proof lies ignores the well established law of the case.

This Court's June 27, 1988, opinion is clear and without ambiguity. If ambiguity were present, the time to have raised that issue was in a timely petition for rehearing. No such petition was ever filed. Rule 51 of the Supreme Court Rules specifies that a petition for rehearing must be filed within 25 days unless the time is extended by the Court. Having chosen not to seek a rehearing but to pursue his remedies upon remand to the Fourth Circuit, the petitioner cannot now complain about issues decided in this Court's June 27, 1988, opinion.

B.

The Petition Raises Issues Which Should Have Been Raised, If At All, In The Course Of The First Appeal

In its 1986 decision the Fourth Circuit made it clear that UTC had introduced sufficient evidence to meet the tests of the government contractor defense:

> Because Sikorsky [UTC] has satisfied the requirements of the military contractor defense, it can incur no liability for negligence or breach of warranty for the allegedly defective design of the escape hatch. 792 F.2d 413, 415.

Petitioner contends in Questions 3, 5, 6, 9 and 10 that there was sufficient evidence to support the jury verdict despite the evidence introduced by UTC to establish its compliance with the government contractor defense. To put it another way, petitioner says now that there was sufficient evidence that UTC did not meet the standards of the government contractor defense so that the Fourth Circuit was wrong in its 1986 opinion when it found that UTC had established the defense. Issues as to the sufficiency of the evidence were not before this Court when the matter was originally briefed and argued. Such issues cannot now be brought before the Court under the guise of a petition addressed to the August 3, 1988, decision of the Court of Appeals. In fact, this Court explicitly recognized that at the time of the first appeal to this Court the petitioner did not seek, nor did this Court grant, a review on the sufficiency of the evidence determination by the Fourth Circuit. ____ U.S. ____ , 108 S. Ct. 2510, 2519 (1988).

Had petitioner thought that UTC had not shown sufficient facts to establish its compliance with the government contractor defense he should have sought re-

view of that issue in his original petition to this Court. Having chosen not to do so then, he cannot raise that issue now.

C.

THE COURT OF APPEALS PROPERLY RESPONDED TO THE QUESTION PUT TO IT BY THIS COURT UPON REMAND

Petitioner grossly misstates this Court's directions to the Court of Appeals. Petitioner contends in Question 2 that this case was remanded for the Fourth Circuit to make a "factual evaluation" of the government contractor defense. This Court gave no such direction to the Court of Appeals.

The question in this case on remand was starkly simple: Did the Fourth Circuit decide, using principles appellate courts have always used, that no reasonable jury could find that UTC had failed to establish all the factual elements needed for the government contractor defense? If it did, that ends the matter, and its judgment stands. Alternatively, did the Fourth Circuit, sitting as an independent trier of the fact, weigh the evidence and then conclude, on its own, from its independent review of the evidence, that the defense was made out? The latter would have been error.

The Fourth Circuit did not hesitate in its response. It explained that its prior holding was based upon its finding that no reasonable jury could have found on the facts presented any way other than that UTC had established the government contractor defense. That did not involve an evaluation of the evidence. It involved only the Fourth Circuit's affirmation that it had found that the uncontroverted evidence introduced by UTC established the government contractor defense as a matter of law. The Court of Appeals affirmed that was precisely what it had done. The Fourth Circuit then did no more than

appellate courts typically do when faced with a case where the evidence does not support the verdict—it directed a motion for judgment notwithstanding the verdict.

III.

CONCLUSION

This case was remanded to the Fourth Circuit for clarification of its 1986 opinion only because petitioner himself had previously raised questions as to the basis for the Fourth Circuit's opinion. While this Court thought those questions were "doubtful," it nevertheless gave petitioner the benefit of every doubt and remanded the case to the Fourth Circuit for clarification. The Fourth Circuit has now clarified its opinion. There is nothing further to review, and the writ should be denied.

Respectfully submitted,

LEWIS T. BOOKER
LONNIE D. NUNLEY, III
Hunton & Williams
707 East Main Street
P. O. Box 1535
Richmond, VA 23212
(804) 788-8200